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No. 96-1768

In The

Supreme Court of the United States

OCTOBER TERM, 1997

C. ELVIN FELTNER, JR.,
Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL FOOTBALL LEAGUE, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL HOCKEY LEAGUE, AND THE OFFICE OF THE COMMISSIONER OF BASEBALL AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether Congress intended to provide a right to a jury trial in copyright infringement actions for statutory damages under 17 U.S.C. § 504(c).

2. Whether the Seventh Amendment requires a right to a jury trial in actions for statutory damages for copyright infringement under 17 U.S.C. § 504(c).

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are four major professional sports leagues, each of which produces a copyrighted joint entertainment product. The National Football League ("NFL") is an unincorporated, non-profit association of 30 member clubs located throughout the United States that collectively produce NFL football. The National Basketball Association ("NBA") is a joint venture of 29 member clubs located throughout the United States and Canada that collectively produce NBA basketball. The National Hockey League ("NHL") is an unincorporated, non-profit association of 26 member clubs located throughout the United States and Canada that collectively produce NHL hockey. The Office of the Commissioner of Baseball ("Commissioner's Office") is responsible for the centralized administration of the sport of Major League Baseball ("MLB") and the 30 major league clubs located throughout the United States and Canada.[1]

The member clubs of the NFL, NBA, NHL, and MLB attempt to strike a balance in televising their games, making as many games as possible available on television without unduly harming live attendance at games. Live attendance is vital not only because gate receipts are an important source of revenue for the clubs, but also because a stadium full of lively fans enhances the qualities of the entertainment product both at the event and for those watching on television.

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[1] Both parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.3(a), letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, counsel for the *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

The *amici* depend on the protection afforded by the Copyright Act to prevent unauthorized broadcasts or retransmissions of their games, as well as unauthorized public showings of games in restaurants and other public places.[2] The *amici* frequently elect statutory damages in actions for copyright infringement because of the difficulty of proving actual damages and because of the delay and expense of a jury trial.[3] In actions against restaurants and other smaller establishments, a jury trial to determine statutory damages may not be a cost-effective option. The *amici* thus have a strong interest in ensuring the continued availability of effective and efficient remedies for copyright infringement.

SUMMARY OF ARGUMENT

1. a. The language of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, demonstrates that Congress did not intend to provide a jury trial right in actions for statutory damages. Section 504(c) of the Act, 17 U.S.C. § 504(c) (1994), provides that a copyright owner "may elect, at any time before final judgment is rendered" to recover statutory damages. If Congress had intended to provide a right to a jury determination of statutory damages, it would not have permitted the copyright owner to elect statutory damages after a jury has determined actual damages and been dismissed.

Section 504(c) further provides that "the court in its discretion" may increase the award if the infringement was willful or decrease it if the infringement was innocent. The term "court," particularly when used in conjunction with the term "discretion," commonly refers to a judge rather than a

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[2] *See, e.g., National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986); *National Football League v. Rondor, Inc.*, 840 F. Supp. 1160 (N.D. Ohio 1993).

[3] *See, e.g., Rondor*, 840 F. Supp. at 1168.

jury. Congress used the same statutory language in 17 U.S.C. § 505 to authorize the judge to award attorney's fees and other costs. By contrast, Congress chose different language to describe the award of actual damages in 17 U.S.C. § 504(b).

b. Other considerations confirm the meaning of the statutory language. Section 504 of the Copyright Act of 1976 is a reenactment of the statutory damages provisions of the Copyright Act of 1909. Congress is presumed to have been aware of judicial decisions under the 1909 Act, which overwhelmingly held that there was no right to a jury trial to determine statutory damages.

The legislative history of the 1909 Act further confirms this conclusion. For example, a Senate Report stated that the new statutory damages remedy would "leav[e] still to the discretion of the court (the proceeding being in equity), where the discretion is invoked, the determination of the total, up to a [statutory] limit." S. Rep. No. 59-6187 at 9 (1907).

2. The Seventh Amendment does not require invalidation of Congress' decision to assign responsibility for determining statutory damages to the judge rather than to a jury.

a. In 18th-century England, actions for copyright infringement were most often brought in the courts of equity. Although a 1710 statute authorized law courts to award non-discretionary damages of one penny per page, an action for a discretionary award of statutory damages is more closely akin to equitable actions for copyright infringement. In the United States, Congress did not introduce discretionary statutory damages until 1909, and most reported cases were equitable actions in which the judge awarded statutory damages.

b. Several features of the statutory damages remedy strongly support the conclusion that it is equitable in nature. First, statutory damages are a highly flexible form of relief intended to permit the court to do justice in each particular

case. Second, an award of statutory damages does not require proof of actual damages, and thus does not implicate the jury's historic role as a fact-finding body. Third, Congress created the statutory damages remedy because the traditional legal remedies were recognized to be inadequate in many cases. Fourth, statutory damages, unlike legal damages, do not serve any particular remedial purpose. Fifth, statutory remedies are designed "to sanction and vindicate the statutory policy," *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952), which makes them equitable rather than legal.

c. Judges are better-suited than juries to make the highly discretionary, multi-factor determination of an appropriate award of statutory damages. Although juries are sometimes called upon to exercise considerable discretion, the Seventh Amendment surely does not require Congress to assign to juries tasks for which judges are better suited, and that are far removed from the jury's core function as a finder of facts.

d. The Seventh Amendment does not require that a particular trial decision be made by the jury unless the decision is "regarded as fundamental, as inherent in and of the essence of the system of trial by jury." *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1390 (1996). Because Parliament and Congress originally imposed mechanical formulas for determining damages, the Seventh Amendment does not prevent Congress from delegating that determination to a trial judge. More recent precedent, which shows that judges have routinely made discretionary awards of statutory damages, supports that conclusion. Moreover, the statutory policy of protecting the value of copyrights is furthered by assigning discretionary determinations of statutory damages to the trial judge.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PROVIDE A RIGHT TO A JURY TRIAL IN COPYRIGHT INFRINGEMENT ACTIONS FOR STATUTORY DAMAGES.

The text of the Copyright Act provides a clear answer to the first question presented in this case: Congress did not intend to provide a right to a jury determination of statutory damages in actions for copyright infringement. The clear meaning of Section 504(c) of the Copyright Act, 17 U.S.C. § 504(c), is confirmed by the language of related provisions of the Act, by Congress' reenactment of the statutory language after it had been held not to provide a jury trial right, and by the drafting history.

A. The Text Of The Copyright Act Demonstrates That Congress Did Not Intend To Provide A Right To A Jury Trial In Statutory Damages Actions.

The Copyright Act provides that a copyright owner may elect to recover from an infringer either (1) the copyright owner's "actual damages" and any additional "profits of the infringer" or (2) "statutory damages." 17 U.S.C. § 504(a) (1994). As to statutory damages, Section 504(c) provides:

> [T]he copyright owner may elect, *at any time before final judgment is rendered*, to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than $500 or more than $20,000 *as the court considers just*.

Id. § 504(c)(1) (emphasis added). Section 504(c) further provides that "*the court in its discretion*" may increase the statutory award to as much as $100,000 if the infringement was willful or decrease the award to as little as $200 if the infringement was innocent. *Id.* § 504(c)(2) (emphasis added). This statutory language clearly demonstrates — in

two separate ways — that Congress did not intend to provide a right to a jury determination of statutory damages.

First, the statute permits a copyright owner to elect statutory damages "at any time before final judgment is rendered." "Final judgment" in a civil action follows the jury's verdict. *See* Fed. R. Civ. P. 58 ("Every judgment shall be set forth on a separate document.").[4] Thus, as courts and commentators have recognized, the statutory language permits a copyright owner to elect statutory damages after the jury has returned a verdict on actual damages and been dismissed.[5] If

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[4] This Court has often addressed the meaning of the term "final judgment." *See, e.g., Flanagan v. United States*, 465 U.S. 259, 263 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). When Congress uses such a term of art, the Court assumes that "Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (citations omitted).

[5] *See Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1371, 1380 (2d Cir. 1993) (copyright owner may choose between statutory damages award and actual damages award prior to final judgment); *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364-65 (S.D.N.Y. 1991) (copyright owner may elect statutory damages after jury awards actual damages); *Glazier v. First Media Corp.*, 532 F. Supp. 63, 68 (D. Del. 1982) (same); *see also Oboler v. Goldin*, 714 F.2d 211, 212-13 (2d Cir. 1983) (per curiam) (copyright owner can elect statutory damages on remand); *Alentino Ltd. v. Chenson Enters. Inc.*, 21 U.S.P.Q.2d 1865, 1867 (S.D.N.Y. 1991) (same), *rev'd in part on other grounds sub. nom. N.A.S. Impact Corp. v. Chenson Enters., Inc.*, 968 F.2d 250 (2d Cir. 1992) (same). The *amicus* supporting petitioner has recognized that

> [t]he statutory language . . . suggests the copyright owner could wait until the jury had returned its verdict for actual damages and profits, . . . then chose to ask for an award of statutory damages instead of having judgment entered on the verdict . . . .

Congress had intended to provide a right to a jury determination of statutory damages, it would not have allowed the copyright owner to elect such damages after dismissal of the jury.

Second, "court" in the legal context commonly refers to a judge or judges. *See Black's Law Dictionary* 353 (6th ed. 1990) ("words 'court' and 'judge' or 'judges' are frequently used in statutes as synonymous"); *Webster's Third New Int'l Dictionary* 522 (unabridged ed. 1993) (defining court as "a judge or judges sitting for the hearing or trial of cases"). The context in which "court" is used in Section 504 confirms that Congress was referring to the trial judge. *See Deal v. United States*, 508 U.S. 129, 132 (1993) ("meaning of a word . . . must be drawn from the context in which it is used") (citation omitted).

Section 504(c) provides that the "court" will exercise "its discretion" in awarding such statutory damages "as the court considers just." Such discretionary rulings are typically assigned to judges rather than juries. Indeed, as explained below, *see* pp. 22-25, Congress' use of the term "discretion" is a strong indication that it viewed the statutory damages remedy as equitable in nature. *See* 1 Dan B. Dobbs, *Law of Remedies* § 2.1(1), at 57 (2d ed. 1993) ("striking characteristic of equity and equitable remedies is a high degree of discretion").

The meaning of "court" in Section 504(c) is confirmed by the language of two related provisions of the Copyright Act. In Section 505, Congress used the same language to describe

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2 Howard B. Abrams, *The Law of Copyright* § 16.04[B], at 16-16.2 (1995).

the awarding of costs, including attorney's fees.[6] It is undisputed that attorney's fees and costs are awarded by the judge rather than the jury.[7] The "normal rule of statutory construction [is] that identical words in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quotations omitted); *see U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.16, at 184 (5th ed. 1993) ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute.").

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[6] Section 505 provides:

> In any civil action under this title, *the court in its discretion* may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505 (emphasis added).

[7] Under the Copyright Act, "'[t]here is no precise rule or formula for making [attorneys' fees] determinations,' but instead *equitable* discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983) (emphasis added); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975) (courts have "inherent power . . . to allow attorneys' fees in particular situations"); *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991) (per curiam) ("Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees").

In Section 504(b), moreover, Congress used *different* language to describe awards of actual damages.[8] "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quotation omitted). The language of these related statutory provisions thus reinforces the ordinary meaning of Section 504(c).

B. Other Considerations Confirm That Congress Did Not Intend To Provide A Right To A Jury Trial In Statutory Damages Actions.

Petitioner correctly observes that "it is generally understood that, so far as is pertinent here, the 1976 Act effectively reenacted the 1909 Act." Pet. Br. 20. Petitioner thus properly embarks on an analysis of the right to a jury trial under the 1909 Act. It is here, however, that petitioner's analysis goes astray.

First, petitioner fails to recognize the overwhelming weight of judicial authority holding that there was no right to a jury trial under the 1909 Act.[9] *See* 2 Paul Goldstein,

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[8] Section 504(b) provides, in part:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement . . . . In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(b).

[9] *See Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 81-82 (1st Cir. 1957); *S.E. Hendricks Co. v. Thomas Publ'g Co.*, 242 F. 37, 41-42 (2d Cir. 1917); *Cayman Music, Ltd. v. Reichenberger*, 403 F. Supp. 794, 797 (W.D. Wis. 1975); *Rodriguez Serra v. Matias Photo Shop*, 21 F.R.D.

Copyright § 14.6.1, at 14:35 (2d ed. 1996) ("those courts that addressed the question generally held that statutory damages under the 1909 Act represented equitable relief"). Shortly after Congress enacted the 1909 Act, the Second Circuit observed:

> We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and (2) to give the new right of application *to the court* for such damages as shall 'appear to be just' in lieu of actual damages.

S.E. Hendricks Co., 242 F. at 41-42 (emphasis added).[10]

188, 190 (D.P.R. 1957); *Vitagraph, Inc. v. Grobaski*, 46 F.2d 813, 815 (W.D. Mich. 1931); *see also No-Leak-O Piston Ring Co. v. Norris*, 277 F. 951, 954 (4th Cir. 1921) (award of statutory damages is "committed to the discretion of the trial judge"); *Campbell v. Wireback*, 269 F. 372, 375 (4th Cir. 1920) (same); *Cravens v. Retail Credit Men's Ass'n*, 26 F.2d 833, 835-36 (M.D. Tenn. 1924) (declining to refer statutory damages issue to a jury). Although the District Court for the District of Massachusetts found a right to a jury trial, *see Chappell & Co. v. Cavalier Cafe, Inc.*, 13 F.R.D. 321, 323 (D. Mass. 1952), that decision was implicitly overruled by the First Circuit's subsequent decision in *Chappell & Co. v. Palermo Cafe*, 249 F.2d 77 (1st Cir. 1957). *See also* Julian Caplan, *The Measure of Recovery in Actions for the Infringement of Copyright*, 37 Mich. L. Rev. 564, 587 (1939) (schedule in statutory damages provision "is supposed to aid the *judge* in the exercise of his discretion" (emphasis added)).

[10] Petitioner relies on the Second Circuit's decision in *Mail & Express Co. v. Life Publ'g Co.*, 192 F. 899 (2d Cir. 1912). *See* Pet. Br. 19-20. In that decision, however, the Second Circuit did not hold that there was a *right* to a jury trial in statutory damages actions, but only that the statute *permits* the trial judge to refer the matter to a jury. *Mail & Express*, 192 F. at 901 ("we do not think . . . it is required that the judge acting by himself shall assess the damages"). In light of the Second Circuit's pronouncement five years later in *S.E. Hendricks* (in which the Second Circuit discussed the *Mail & Express* decision, *see* 242 F. at 40-41), it is

Only one year before Congress reenacted the provisions of the 1909 Act, a district court confirmed that there was no right to a jury trial. *See Cayman Music*, 403 F. Supp. at 797. If Congress had intended to provide a right to a jury trial in statutory damages actions, it surely would not have remained silent in light of these judicial interpretations of the Act. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); 1A *Sutherland Statutory Construction, supra*, § 22.33, at 291 ("[T]he legislature is presumed to know the prior construction of the original act, and if words or provisions in the act or section amended that had been previously construed are repeated in the amendment, it is held that the legislature adopted the prior construction of the word or provision.").

Second, petitioner and his *amicus* overlook crucial provisions of the legislative history of the 1909 Act. A Senate Committee Report clearly indicates that the new statutory damages remedy created by the 1909 Act was for the trial judge sitting in equity. After describing the revisions to the statutory provisions for recoveries under the Copyright Act, the Report states:

> It particularly eliminates from the latter all recoveries in the nature of mere penalties, specifying certain sums as a basis for computation, but doing this only by way of suggestion, and leaving still to the discretion of the court (*the proceeding being in equity*), *where discretion is*

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clear that the Second Circuit believed that there was no right to a jury trial. *Id.* at 41. Petitioner ignores *S.E. Hendricks*, the holding of which was reaffirmed in *Oboler v. Goldin*, 714 F.2d 211, 212-13 (2d Cir. 1983) (per curiam).

> *invoked*, the determination of the total, up to a limit of $5,000.

S. Rep. No. 59-6187 at 8-9 (1907) (emphasis added), *reprinted in* 6 E. Fulton Brylawski & Abe Goldman, Legislative History Of The 1909 Copyright Act, Part Q, at 8-9 (1976) (hereinafter "Brylawski & Goldman").[11]

The passage from the hearings cited by *amicus* (Abrams Br. 21) is entitled to considerably less weight than a Committee Report, *see Zuber v. Allen*, 396 U.S. 168, 186 (1969), and in any event provides further evidence that the participants in the legislative debate did not understand that there would be a right to a jury trial of statutory damages. Mr. Wilcox recognized that a plaintiff could elect to have statutory damages determined by the judge:

> if the plaintiff sought his remedy on the equity side of the court and asked . . . for the substituted damages which are provided for in the second half of that section, then it would be for the court to assess the damages unless it referred that section of assessment of damages to a jury.

Arguments Before The Joint Committee on Patents (Dec. 7-11, 1906), *reprinted in* 4 Brylawski & Goldman, *supra*, Part J, at 177; *see also* Fleming James, Jr., *Right To A Jury Trial In Civil Actions*, 72 Yale L.J. 655, 655 (1963) ("issues in suits in equity, were not [tried to a jury], unless the chancellor in his discretion sent an issue to a jury for an advisory

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[11] Although this report accompanied a predecessor bill, the provisions on statutory damages in the predecessor bill were essentially identical to provisions of the 1909 Act. The only substantive difference was that the 1909 Act imposed both an upper and a lower limit on statutory damages, while the predecessor bill imposed only an upper limit.

verdict"); Fed. R. Civ. P. 39(c) (authorizing use of advisory juries).[12]

Mr. Steuart, the principal drafter of the statutory damages provision, *see* Abrams Br. 21, expressed the same understanding:

> The language of the section, 'In lieu of actual damages and profits, such damages as to the court shall appear just,' would appear to put into the court the absolute right *where it was an equity case* to decide what should be allowed in the way of liquidated damages, subject of course to the limitations that it must not be less than $250 nor more than $5,000.

4 Brylawski & Goldman, *supra*, at Part J, at 176 (emphasis added). Other passages from the legislative history confirm the understanding that the copyright owner — but not the alleged infringer — could determine whether a jury would decide the statutory damages issue by deciding whether to bring an action at law or a suit in equity.[13] *See also* James,

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[12] *Mail & Express Co. v. Life Publ'g Co.*, 192 F. 899 (2d Cir. 1912), upon which petitioner relies, is an example of a court exercising this discretion.

[13] For example, in recommending a change to Section 70, Mr. Steuart stated that:

> we could add a third clause which would permit either a suit at law, *or a suit in equity* because the section, 70, is not limited to either one of those forms of action.

Stenographic Report of the Proceedings at the Third Session of the Conference on Copyright (Mar. 15, 1906), *reprinted in* 3 Brylawski & Goldman, *supra*, Part E, at 243 (emphasis added); *see also id.* at 240 (statement of Mr. Lucking) (bill "attempt[s] to give jurisdiction to a court in equity" to award statutory damages).

The statements from the legislative history set forth by petitioner, Pet. Br. 18 n.6, do not contradict this conclusion. Rather, they simply reflect

supra, 72 Yale L.J. at 671-72 (in copyright actions not seeking a penalty, plaintiff had power to control whether dispute was heard in equity or at law).[14]

In sum, Congress intended to assign the determination of statutory damages for copyright infringement to the trial judge rather than to a jury. At a minimum, nothing in the language of the statute or its drafting history indicates that Congress intended to create a right to a jury trial of statutory damages. This Court has recognized that "statutory silence" is not a sufficient basis for inferring a right to a jury trial. *Tull v. United States*, 481 U.S. 412, 417 n.3 (1987); *see also Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 n.3 (1990).

II. THE SEVENTH AMENDMENT DOES NOT REQUIRE A JURY DETERMINATION OF STATUTORY DAMAGES IN A COPYRIGHT INFRINGEMENT CASE.

The remaining question is whether Congress' decision to authorize trial judges to assess statutory damages for copyright infringement must be invalidated as incompatible with the Seventh Amendment. The analysis that this Court applies to

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the understanding that a jury would resolve the statutory damages question *if* the case were to proceed at law, rather than in equity. *See also* 3 Brylawski & Goldman, *supra*, Part E, at 239-40 (statement of Mr. Elder) (recognizing that plaintiff could proceed either in law or equity to recover statutory damages).

[14] The legislative history of the Semiconductor Chip Protection Act of 1984 (which did not amend Section 504 or any other existing provision of the Copyright Act of 1976) does not support a different conclusion. *See Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) ("'views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

such questions is well-established. "'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.'" *Terry*, 494 U.S. at 565 (quoting *Tull*, 481 U.S. at 417-18)); *see also Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). The second factor, the nature of the remedy, is the "more important" one. *Terry*, 494 U.S. at 565.[15] If the Court determines that "the action in question belongs in the law category," it then asks "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996). Consideration of these factors demonstrates that the Seventh Amendment does not bar Congress from allocating the statutory damages determination to the trial judge.

A. Pre-Merger Custom Supports The Conclusion That There Is No Seventh Amendment Right To A Jury Trial In Statutory Damages Actions.

1. In 18th-Century England, Most Actions For Copyright Infringement Were Brought In Courts Of Equity.

In 18th-century England, an action for copyright infringement could be brought either in a court of equity or in a court of law. Indeed, as petitioner recognizes, equitable actions for copyright infringement were considerably more common than legal actions. *See* Pet. Br. 39 n.29. Petitioner

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[15] The Court has identified a third factor, the "practical abilities and limitations of juries," *Ross*, 396 U.S. at 538 n.10, that may limit the right to a jury trial but cannot serve "as an independent basis for extending the right to a jury trial under the Seventh Amendment," *Tull*, 481 U.S. at 418 n.4; *see also Terry*, 494 U.S. at 565 n.4.

states (Pet. Br. 26 n.14) that the monopoly granted by the early licensing acts was enforced in courts of law. Such monopolies, however, were also enforced in courts of equity. *See The Co. of Stationers v. Lee*, 2 Show. K.B. 248, 89 Eng. Rep. 927 (1681). Following the enactment of the Statute of Anne in 1710, courts of equity continued to enjoin copyright infringement. *See Millar v. Taylor*, 4 Burr. 2303, 2396, 98 Eng. Rep. 201, 251 (K.B. 1769) (remedy for copyright infringement is "by an action upon the case, for damages, or a bill in equity for specific relief"). The opinions in *Millar v. Taylor* discuss several cases in which courts of equity enjoined the infringement of published works. *See* 4 Burr. 2302, 2325, 98 Eng. Rep. 201, 213 (K.B. 1769) (citing *Eyre v. Walker* (1735); *Motte v. Falkner* (1735); *Walthoe v. Walker* (1736); *Tonson v. Walker* (1739)). Courts of equity also enjoined the infringement of an author's copyright in his unpublished work. *See, e.g., Macklin v. Richardson*, Amb. 694, 27 Eng. Rep. 451 (1770); *Duke of Queensberry v. Shebbeare*, 2 Eden. 329, 28 Eng. Rep. 924 (1758); *Pope v. Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (1741); *Forrester v. Waller* (1741), *cited in Millar*, 4 Burr. at 2331, 98 Eng. Rep. at 216.[16]

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[16] In *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (K.B. 1774), the House of Lords overruled *Millar*, holding in a 6-5 decision that the Statute of Anne had displaced the common law copyright for published works. Five of the judges in the majority further concluded that, "the author, by the said statute, is precluded from every remedy except on the foundation of the said statute and on the terms and conditions prescribed thereby." 4 Burr. at 2413-2417, 98 Eng. Rep. at 260-262. The sixth, however, concluded that "there may be a remedy in equity upon the foundation of the statute, independent of the terms and conditions prescribed by the statute, in respect of penalties enacted thereby." 4 Burr. at 2409; 98 Eng. Rep. at 258. Accordingly, the issue of whether equitable remedies could be granted under the Statute of Anne was not resolved in *Donaldson*.

Petitioner pays scant attention to these equitable actions, focusing instead on actions at law for damages under the Statute of Anne. But an action for damages under the Statute of Anne was not an action for a discretionary award of statutory damages. The Statute of Anne provided for damages determined by a mechanical formula of "one penny for every sheet which shall be found in [the infringer's] custody," 8 Anne ch. 19 (1710). In marked contrast, an action for statutory damages under the Copyright Act of 1976 calls for a discretionary award in such amount "as the court considers just." 17 U.S.C. § 504(c)(1). *See* 2 D. Dobbs, *Law of Remedies, supra*, § 6.3(3), at 57 ("Although statutory damages find parallel in the kind of liquidated damages statute that authorizes recovery . . . for each offense, the copyright statute differs significantly from such statutes."); *see also Douglas v. Cunningham*, 294 U.S. 207, 210 (1935) (court need not apply a "statutory yardstick" in awarding statutory damages under 1909 Act).[17]

Moreover, a copyright owner is not required to present proof of actual damages or other facts to receive an award of statutory damages. *See F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 230, 234 (1952) (affirming statutory damages award even though record was "inadequate to establish an actually sustained amount"); *Douglas v. Cunningham*, 294 U.S. at 208 (statutory damages award should not have been modified by court of appeals even though "the petitioners admitted inability to prove actual damages"); *see also* 2 H. Abrams, *The Law of Copyright, supra*, § 16.04, at 16-16 (statutory damages "give[] to the court the power to simply pick a sum of money to be awarded

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[17] Accordingly, this Court's decision in *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 455 (1854), that a claim for penalties of a dollar a sheet could not be enforced in equity simply has no bearing on the question presented.

as damages . . . without any proof of monetary loss by the copyright owner").

An action for a discretionary award of damages, although unknown in 18th-century England, is thus related to equitable actions for copyright infringement. "The courts of law gave, as they were bound to give, the judgment to which the parties were entitled, taking into consideration only the facts pleaded and proved by evidence." 12 William Holdsworth, *A History of English Law* 595 (1938). In contrast, equity "always took all the circumstances of the case and conduct of the parties into consideration; and its remedies were, for that reason, always discretionary." *Id.* at 565.

2. Pre-Merger Practice In The United States Supports The Conclusion That There Is No Right To A Jury Trial In Actions For Statutory Damages.

Early copyright statutes enacted by Congress followed the model of the Statute of Anne by providing for damages determined by simple multiplication. *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124-25 (fifty cents per sheet); Act of April 29, 1802, ch. 36, § 3, 2 Stat. 171-72 (one dollar per print). Congress first departed from the simple multiplication approach in the Act of August 18, 1856, 11 Stat. 138, which provided that infringers of rights in dramatic compositions were "liable for damages . . . such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just." *See Brady v. Daly*, 175 U.S. 148, 153 (1899) (setting forth text of statute, then codified as Section 4966 of the Revised Statutes). As the Court explained in *Brady*, however, an award in excess of the statutory minimum amounts required proof of *actual* damages. *See id.* at 154 (statute "provides a minimum sum for a recovery in any case,

leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made"); *id.* at 155 (where "the plaintiff had, in fact, sustained a greater amount than the minimum sum of damages provided in the statute," plaintiff could recover "the actual amount of damages which the evidence showed had been sustained by the plaintiff"); *id.* at 156 (act provides that "damages shall not be less than a certain sum, and may be more, if proved").[18]

Congress introduced discretionary statutory damages (also referred to as "in lieu" damages) in 1909. The novelty of this discretionary award was recognized by participants in the legislative debates and by the courts. For example, Mr. Parkinson observed:

> [Y]ou have gone away beyond . . . any common-law right or remedy that has ever been given in a statute before. . . . You have made provision by which the recovery of costs shall be as never have appeared in any federal court before.

Arguments Before the House Copyright Subcommittee of the Committee on Patents, Jan. 20, 1909, *reprinted in* 5 Brylawski & Goldman, Part L, at 31. *See also* Caplan, *supra*, 37 Mich. L. Rev. at 588 (statutory damages "are a rarity in the law and bound to evoke criticism from exponents of the

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[18] The Court's suggestion in *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 109 (1919), that the statutory damages provision of the 1909 Act incorporated aspects of Section 4966 clearly applied only to "the minimum limitation."

The Act of March 2, 1895, ch. 194, 28 Stat. 965, which set maximum and minimum awards for various works of visual art, merely placed upper and lower limits on monetary awards that were determined by simple multiplication (one dollar per sheet), rather than by an exercise of the court's discretion.

common-law system of measuring damages"). Eight years after the passage of the 1909 Act, the Second Circuit declared:

> We entertain no doubt that it was the intention of Congress . . . to give the *new* right of application to the court for such damages as shall 'appear to be just' in lieu of actual damages.

S.E. Hendricks Co., 242 F. at 41-42 (emphasis added); *see also Gross v. Van Dyk Gravure Co.*, 230 F. 412, 413 (2d Cir. 1916) (Congress replaced the "old penalties" with a "discretionary power of the court" to award damages "without the limitations of usual legal proof"); *Woodman v. Lydiard-Peterson Co.*, 192 F. 67, 70 (D. Minn. 1912) ("Prior to the Act of 1909 [plaintiff] had to prove his damages.").

An overwhelming majority of the reported actions for statutory damages decided between 1909 and the merger of law and equity in the federal court system in 1938 were brought on the equity side of the court.[19] Indeed, all three of the statutory damages actions decided by this Court between 1909 and 1938 were brought in equity, and in each case the trial judge awarded statutory damages. *See Douglas v. Cunningham*, 294 U.S. 207 (1935); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 (1931); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919); *see also F.W. Woolworth Co.*, 344 U.S. at 236 (Black, J., dissenting) ("this Court has held that the amount of such damages is committed

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[19] *See, e.g., Russell & Stoll Co. v. Oceanic Elec. Supply Co.*, 80 F.2d 864 (2d Cir. 1936) (per curiam); *Insurance Press v. Ford Motor Co.*, 255 F. 896 (2d Cir. 1918) (affirming without opinion decision of A. Hand); *Gross*, 230 F. 412); *Cravens*, 26 F.2d 833; *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (L. Hand, J.); *Norris v. No-Leak-O Piston Ring Co.*, 271 F. 536 (D. Md.), *aff'd*, 277 F. 951 (4th Cir. 1921); *Altman v. New Haven Union Co.*, 254 F. 113 (D. Conn. 1918); *Waterson, Berlin & Snyder Co. v. Tollefson*, 253 F. 859 (S.D. Cal. 1918); *Sauer v. Detroit Times Co.*, 247 F. 687 (E.D. Mich. 1917).

to the unreviewable discretion of a trial judge"). In the light of these precedents, it is clear that a defendant was not regarded as having a right to a jury trial for statutory damages, although a copyright owner could obtain a jury trial by initiating the action in the law court.[20]

B. The Statutory Damages Remedy Is Equitable In Nature.

Although "an action for money damages was 'the traditional form of relief offered in the courts of law,'" it is not the case that "any award of monetary relief must *necessarily* be 'legal' relief." *Terry*, 494 U.S. at 570 (quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974)); *see also id.* at 591 (Kennedy, J., dissenting) ("we have not adopted a rule that a statutory action permitting damages is by definition more analogous to a legal action than to any equitable suit"). When an award of money damages serves an equitable purpose, this Court has not hesitated to find that there is no right to a jury trial. *See, e.g., Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (awards of lost wages under Fair Labor Standards Act are equitable); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (recovery and restitution of illegal rents under Emergency Price Control Act is equitable). *See generally* 1 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* (5th ed. 1941) § 112, at 147-49 (equity courts awarded monetary relief).

Historically, actions at law were intended to compensate the plaintiff for injuries caused by the defendant's conduct. *See Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867) ("The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the

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[20] *See Arnstein v. Twentieth Century Fox Film Corp.*, 3 F.R.D. 58 (S.D.N.Y. 1943) (copyright plaintiff "had a right to elect whether he would sue at law or in equity"); James, *supra*, 72 Yale L.J. at 671-72.

injury."); 1 *Pomeroy's Equity Jurisprudence*, *supra*, § 109, at 140-41 ("the law gives . . . the recovery of money, which may be either an ascertained sum owed as a debt, or a sum by way of compensation, termed damages"). Thus, statutory actions brought to recover *actual* damages are traditionally viewed as legal. *See Curtis*, 415 U.S. at 196. Actions to recover civil penalties also were within the jurisdiction of the law courts. *See Tull*, 481 U.S. at 418. These penalties were intended to punish culpable individuals, and they were thus afforded a right to a jury trial. *See Tull*, 481 U.S. at 422.

Statutory damages under the Copyright Act cannot be classified either as actual damages or as a civil penalty. Statutory damages "compel[] restitution of profit and reparation for injury" as well as "discourage wrongful conduct." *F.W. Woolworth*, 344 U.S. at 233. They may be awarded even if defendant's conduct was "uninjurious and unprofitable." *Id.* In short, the statutory damages remedy is unique. 2 D. Dobbs, *Law of Remedies*, *supra*, § 6.3(3), at 57; *see also* H. Abrams, *The Law of Copyright*, *supra*, § 16.04, at 16-15 to -16 (statutory damages are "[p]erhaps the most unique feature of the remedies for copyright infringement"). Several features of the statutory damages remedy point strongly to the conclusion that it is equitable rather than legal in nature.

First, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *see Alexander v. Hillman*, 296 U.S. 222, 239 (1935) ("Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights"); 1 *Pomeroy's Equity Jurisprudence*, *supra*, § 109, at 141 ("the court of equity has

the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties"); 1 D. Dobbs, *Law of Remedies*, *supra*, § 2.1(1), at 56 ("the Chancellors also invented remedies."). Legal remedies, by contrast, generally are characterized by "their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use." 1 *Pomeroy's Equity Jurisprudence*, *supra*, § 109, at 140.

Statutory damages fit the flexible equity model. In *L.A. Westermann*, this Court observed that statutory damages are to be controlled by "the court's discretion and sense of justice." 249 U.S. at 106. The amount awarded should be based on "the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like." *Id.* In *Douglas v. Cunningham*, this Court reiterated that "[t]he trial judge may allow such damages as he deems to be just" and that "[t]his construction is required by the language and the purpose of the statute." 294 U.S. at 210. In *F.W. Woolworth*, this Court again observed that "[t]he necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of wide *judicial* discretion within limited amounts conferred by this statute." 344 U.S. at 232 (emphasis added).

Second, an award of statutory damages does not implicate the jury's core function as a "'fact-finding body.'" *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).[21] A

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[21] The Court's focus on protecting the fact-finding role of the jury in Seventh Amendment cases is rooted in the text of the Constitution, which provides, in part, that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

copyright owner need not submit proof of actual damages or profits to obtain a statutory damages award. *See F.W. Woolworth*, 344 U.S. at 232-33 (court has discretion to award statutory damages greater than amount of defendant's profits); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (plaintiffs may elect statutory damages "whether or not adequate evidence exists as to the actual damages incurred by plaintiffs or the profits gained by defendants"); p. 17 above.

Third, Congress created the statutory damages remedy because the traditional legal remedies — actual damages and profits — were recognized to be inadequate in many cases. *See Douglas*, 294 U.S. at 209 ("rules of law render difficult or impossible proof of damages or discovery of profits"); *see also F.W. Woolworth Co.*, 344 U.S. at 234 ("statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just"); *Business Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 406 (2d Cir. 1989) ("The specific purpose of [section 504(c)] is to offer plaintiffs an alternative for use where Section 504(b) provides inadequate relief."). Inadequacy of legal remedies is a basis for affording equitable relief. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("suit in equity may lie though a comparable cause of action at law would be barred.").

Fourth, Congress has not limited the range of factors that the trial court may consider in determining an appropriate award of statutory damages, which can vary by a factor of 40 (from $500 to $20,000). Indeed, a statutory damages award is effectively immune from judicial review. *See L.A.*

Westermann Co., 249 U.S. at 106.[22] As this Court has recognized, such "highly discretionary calculations that take into account multiple factors . . . are the kinds of calculations traditionally performed by judges." *Tull*, 481 U.S. at 427.

Fifth, statutory damages serve "to sanction and vindicate the statutory policy." *F.W. Woolworth Co.*, 344 U.S. at 233. This is a role traditionally performed by the equity courts. "As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'" *Mitchell*, 361 U.S. at 292 (quoting *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 203 (1839)); *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946) (court has inherent equitable jurisdiction to award return of excessive rent charges to ensure that "the statutory policy of preventing inflation is . . . advanced").[23]

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[22] As petitioner recognizes (Pet. Br. 44 n.33), jury awards of discretionary damages are "subject to appropriate judicial review." *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994) ("in civil cases, the jury's discretion to determine the amount of damages was constrained by judicial review").

[23] Petitioner argues that a jury must award statutory damages because the award may be increased upon a finding of willful infringement. But Congress may provide for increased damages for willful violations of law without affording a right to a jury trial. For example, the Patent Act permits the trial judge to increase a damages award up the three times the actual damages upon a finding of willfulness. This Court long ago held that "[t]he power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages by the jury." *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 488 (1853); *see also Swofford v. B & W, Inc.*, 336 F.2d 406, 413 (5th Cir. 1964) ("[W]e think that 35 U.S.C. § 284 (1958), which gives the trial judge discretion to increase the damages up to three times the amount found by the jury or assessed by the trial judge, does not deny the plaintiffs any constitutional right to a jury trial."), *cert. denied*, 379 U.S. 962 (1965). In addition, trial judges frequently make findings of "bad

C. The Relative Abilities Of Judges And Juries Weigh Against Finding A Constitutional Right To A Jury Trial.

This Court also may consider the relative abilities of judges and juries as an additional factor that weighs against finding a Seventh Amendment right to a jury trial. The award of statutory damages is a largely unguided exercise of discretion that calls on the decisionmaker to weigh a variety of factors, including the policy choices embodied in the Copyright Act. *See Broadcast Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 489 (7th Cir. 1995) (court has "almost unfettered discretion" in setting the amount of statutory damages). As Learned Hand described the task:

> I must assess the damages, all things considered, by the best inference I can make, even where I cannot have much basis for certainty, *even when the plaintiff would fail, were the issue tried before a jury*.

Gross, 230 F. at 413 (emphasis added) (setting forth Hand's opinion in trial court); *see also F.W. Woolworth Co.*, 344 U.S. at 231 ("recovery may be awarded without any proof of injury"); *Morley Music Co. v. Dick Stacey's Plaza Motel, Inc.*, 725 F.2d 1, 3 (1st Cir. 1983) ("there need not be the kind of hearing required if factual damages were the issue"); *Russell & Stoll Co. v. Oceanic Elec. Supply Co.*, 80 F.2d 864, 865 (2d Cir. 1936) (per curiam) ("court may use [statutory damages] without proof of the quantum of loss"); *Campbell*, 269 F. at 375 (affirming judge's award of statutory

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faith" in connection with awarding attorneys' fees. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) ("under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith"); *Alyeska Pipeline*, 421 U.S. at 258-59 (judge may award attorneys' fees upon finding of "willful disobedience" and "bad faith").

damages even though "damages are indirect and not capable of ascertainment"); *S.E. Hendricks*, 242 F. at 42 (court sets damages "without being bound to or by legal proof").[24]

Although juries sometimes are called upon to exercise considerable discretion, the Seventh Amendment surely does not *require* a jury to make a determination that is so far afield from its basic fact-finding function, and that Congress has assigned to the trial judge.[25]

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[24] Courts have considered a wide variety of factors in determining statutory damages, including: restitution, compensation, and deterrence, *F.W. Woolworth*, 344 U.S. at 233; whether the parties complied with their contractual obligations, *Frankel v. Stein & Day, Inc.*, 470 F. Supp. 209, 215 n.4 (S.D.N.Y. 1979), *aff'd*, 646 F.2d 560 (2d Cir. 1980); the defendant's state of mind, *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288, 1296 (D.R.I. 1982); whether the defendant relied on counsel, *National Geographic Soc'y v. Classified Geographic, Inc.*, 27 F. Supp. 655, 662 (D. Mass. 1939); a pattern of past infringements, *Kenbrooke Fabrics, Inc. v. Holland Fabrics, Inc.*, 602 F. Supp. 151 (S.D.N.Y. 1984); potential damage to the plaintiff's reputation caused by the poor quality of the infringing work, *United Features Syndicate, Inc. v. Spree*, 600 F. Supp. 1242, 1247 (E.D. Mich. 1984), *appeal dismissed*, 779 F.2d 53 (6th Cir. 1985); the training and effort undertaken by the plaintiff, *Cory v. Physical Culture Hotel, Inc.*, 14 F. Supp. 977, 984 (W.D.N.Y. 1936), *aff'd*, 88 F.2d 411 (2d Cir. 1937); and whether the defendant acknowledged copying the plaintiff's work, *Warren v. White & Wycoff Mfg. Co.*, 39 F. 2d 922, 923 (S.D.N.Y. 1930).

[25] Although a jury may be of "immense value in . . . adjudicating troublesome issues of fact. . . . it is not showing care for the jury to force it into classes of claims where the right is dubious and the use inconvenient and burdensome." *Damsky v. Zavatt*, 289 F.2d 46, 59 (2d Cir. 1961) (Clark, J., dissenting). *See* James, *supra*, 72 Yale L.J. at 691 n.203 (referring to Judge Clark's view as "wise and temperate").

D. Judicial Determination of Statutory Damages Does Not Interfere With The Substance Of The Right To Jury Trial.

Even when the Court is confronted with an action that was tried at law in 1791, it asks "whether the particular trial decision [at issue] must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman v. Westview Instruments, Inc.*, 116 S. Ct. at 1389. The Seventh Amendment requires that the jury decide only those matters that are "necessary to preserve the "substance of the common-law right of trial by jury."'" *Id.* at 1390 (quoting *Tull*, 481 U.S. at 426, quoting, in turn, *Colegrove v. Battin*, 413 U.S. 149, 156 (1973)). "'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.'" *Markman*, 116 S. Ct. at 1390 (quoting *Tull*, 481 U.S. at 426). In determining whether an incident is necessary to preserve the substance of the right to trial by jury, the Court has looked to historical practice, and, if the historical evidence is unclear, to more recent precedent, the relevant statutory policies, and to the relative interpretive skills of judges and juries. *Markman*, 116 S. Ct. at 1393.

Petitioner asserts (Pet. Br. 39 & n.29) that there is no pre-1791 authority addressing whether the damages under the Statute of Anne were determined by a jury. In fact, however, Parliament itself determined that damages for copyright infringement should be one penny per sheet, just as Congress provided for damages of fifty cents or one dollar per sheet in early copyright statutes in the United States. *See supra* p. 16, 18. Because "Congress itself" may (and, in fact, did) determine the amount of statutory damages, "it may delegate that determination to trial judges." *Tull*, 481 U.S. at 427.

More recent precedent provides additional support for the conclusion that determination of statutory damages is not "of

the essence of" the jury trial right. In the United States, federal courts sitting in equity routinely determined statutory damages for copyright infringement from the time the remedy was introduced in 1909. Moreover, Congress' assignment of the statutory damages determination to trial judges furthers the statutory policy of protecting intellectual property by permitting copyright owners to avoid the expense and delay of a jury trial. Finally, "highly discretionary calculations that take into account multiple factors" are traditionally assigned to judges rather than juries. *Tull*, 481 U.S. at 427.[26]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[26] In determining the "substance of the common law right," the Court has also looked to whether an issue of law or fact is to be decided. *See Markman*, 116 S. Ct. at 1390. As explained above, p. 26, an award of statutory damages does not require any factual findings, and thus assigning this determination to the judge does not invade the jury's core fact-finding role.